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THIS PAPER DISCUSSES whether or not a divorce court, by granting a continuing order for support and/or alimony, thereby retains such jurisdiction over the person that it need only give notice by mail or publication before reducing an arrearage to a lump sum judgment[1] which, under "due process," is entitled to full faith and credit in the courts of sister States.[2] It is assumed that the court had jurisdiction over the person of the defendant at the time the order for support and/or alimony was originally granted.[3]

An action at law is generally terminated with the final decree of judgment, and the court after a time (after term or time for appeal) loses jurisdiction.[4] But in equity often the justice of the case requires that there be inserted in the decree some recognition of a right to further relief at a later date.[5] The majority of jurisdictions recognize these principles. Therefore, in divorce cases they usually hold that the relief is generally equitable in nature, and that for the purpose of alimony the court retains jurisdiction after the final decree of divorce, and that the parties remain in court even though they may change their domiciles or residences.[6]

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1 The alternative is to sue on the decree, Barber v. Barber, 21 How. (U. S.) 582 (1858), but this method has been limited to installments granted the courts of States where the right to receive the installment is absolute and "* * * does not obtain where by law of the state in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree * * *." Sistane v. Sistane, 218 U. S. 1 (1910); and see Note, 22 U. Chicago L. R. 246 (1954-55) for a more complete analysis of this method.

2 "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Art. IV, #1, Const. of U. S. Also see, Full Faith and Credit for Divorce Decrees, Present Doctrine and Possible Changes, 9 Vand. L. R. 1 (1955).

3 Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948); and Kreiger v. Kreiger, 334 U. S. 555, 68 S. Ct. 1221, 92 L. Ed. 1572 (1948), recognizing the divisibility of decrees of divorce from those for payment of alimony, and holding that alimony can only be granted when there is jurisdiction in personam.

4 Tichenor v. Collins, 45 N. J. L. 123 (1883).

5 2 Danl. Ch. 1014 (Am. Ed. of 1865).

6 168 A. L. R. 232-241.

The question of continuing jurisdiction in a divorce case was before the Vermont Supreme Court in the case of *Cukor v. Cukor*.[7] In the *Cukor* case the defendant and plaintiff were husband and wife. The plaintiff wife obtained a divorce in New York in 1930. Both parties were then domiciled in the State of New York, and personal service of the petition was made on the defendant. The decree of divorce included an order for alimony in the sum of $65.00 a week. The defendant did not comply with the order, but moved to Vermont and became a resident there. On application of the plaintiff, the New York Court issued an order that the defendant show cause why an entry of judgment should not be entered against him for the arrears of alimony. Under the rules of the New York Court, the order was made returnable on a date certain. The order recited that the defendant was a resident of Sharon, Vermont, and it directed that the service of the order to show cause and papers upon which it was based should be made by mailing true copies thereof by registered mail (return receipt requested) addressed to the defendant in Vermont. The defendant received a copy of the notice, as evidenced by the return receipt, but he made no appearance. The hearing was had and a lump sum judgment was rendered. The plaintiff then sued upon that judgment in Vermont.

Upon the defendant's contention that the New York Court did not have jurisdiction, the Vermont Court held that a summons is sufficient to confer jurisdiction upon the court, where it gives notice according to the statutory requirements with such particularity as not to deceive or mislead; that a final judgment does not terminate a matrimonial action where there is a provision for alimony; and that due process does not require that personal service be made upon a party where the proceeding is only a continuation of litigation which is already within the jurisdiction of the court.

The Vermont Court carefully examined the New York procedure and found that in New York, as in most other jurisdictions, including Ohio,[8] it is necessary that an order for support or alimony, payable in installments, be reduced to a lump sum judgment as to unpaid installments before an execution can lawfully be levied. The Court then concluded that, since this was necessary, the Court had either expressly or impliedly reserved jurisdiction over the person of the defendant, so as to be able to carry its order into effect.

[7] 114 Vt. 456, 49 A. 2d 206, 168 A. L. R. 227 (1946).

[8] See Roach v. Roach, 164 O. S. 587, 59 O. O. 1, 132 N. E. 2d 742 (1956).

In coming to this decision the Vermont Court in part relied upon *Durlacher v. Durlacher*.[9] In that case the defendant, who was then a resident of Nevada, had received the notice that a lump sum judgment was to be rendered. He appeared specially and contested the jurisdiction of the court on the ground that no personal service had been made upon him. In holding that a final judgment does not terminate a matrimonial action as to alimony if there is a provision for such alimony in the judgment, the New York Court said "A judgment directing the payment of monthly alimony by defendant to plaintiff was not affected by defendant's subsequent change of residence or absence from the state."

The New York Court held, in effect, that the notice was constitutional, and that it did not provide for a new judgment. It held further that its only purpose was to furnish a means of effective enforcement of an old judgment, giving the plaintiff no new rights, and adding nothing to the defendant's burden. Such a lump sum judgment, therefore, should not be considered to be the result of a new and independent action, but merely a further step taken in the original matrimonial action.

These two decisions demonstrate that, as far as the courts of some jurisdictions are concerned, there is a principle of continuing jurisdiction in divorce actions, and that due process does not require that personal service be made upon the party, because the proceeding is only a continuation of litigation which was initially within the jurisdiction of the court. But some notice must be given.

In *Griffin v. Griffin*[10] a lump sum judgment for arrearage in alimony was awarded, with no notice to the husband. The United States Supreme Court held that this was contrary to the requirements of due process, as it divested him of the benefits of defenses, such as payment, which he might have had. The Supreme Court held that any reasonable notice, though not personal service, was required, saying:

> "It is immaterial whether petitioner at the time of the 1938 proceedings was a domiciled resident of New York, either within or temporarily without the state, or a resident of some other jurisdiction. In any event a judgment in personam directing execution to issue against petitioner, and thus purporting to cut off all available defenses could not be rendered in any theory of the state's power over him, *with-*

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[9] 173 Misc. 329, 17 N. Y. Supp. 2d 643 (1940).

[10] 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635 (1946).

out some form of notice by person or substituted service." (Emphasis added.)

Two years after the decision in *Griffin v. Griffin* the District of Columbia Circuit Court decided the case of *Sewell v. Trimble.*[11] The Court there relied upon the holding in *Griffin v. Griffin, supra:* "it follows that only 'some form of notice by person or substituted service' was necessary . . . ." There a wife had obtained a divorce in which her husband had been personally served. The District Court was held to have had jurisdiction of the wife's subsequent motion for arrears for maintenance of child of the parties, although notice of the motion was given to the husband only by publication. The reason given was that original jurisdiction continued as long as was necessary in order to make effective the court's orders and decrees in respect to custody, care and maintenance of the child.

Most of the cases which have questioned the propriety of such proceedings arise out of New York judgments. A description of that procedure is explained in *Rice v. Rice.*[12] There a suit for separate maintenance was filed in New York, both parties were residents, and the defendant was personally served. The defendant failed to make payments. The plaintiff filed a motion, without notice, for judgment for the amount of the installments in arrears. Upon hearing the arrearage was ascertained to amount to $840.00. The defendant did not appear. The Court then issued an order that the defendant appear on a date certain, to show cause why an order should not be made directing the Clerk of Court to enter a money judgment in favor of the plaintiff for the amount in arrears. This order, and an affidavit of the plaintiff setting forth that the sum of $840.00 was due, was then mailed to the defendant in Arkansas, by registered air mail. The Arkansas Court held that an order to docket a judgment for arrears in alimony payments, due under a judgment for separate maintenance, was a proceeding to enforce a liability previously adjudged. Hence it held that service of a summons, as in an original suit to establish liability, was not required. It was sufficient, said the Arkansas Court, if there was some form of notice, by personal or substituted service, of the motion to docket judgment.

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[11] 172 F. 2d 27 (C. A., D. C., 1948).

[12] 213 Ark. 981, 214 S. W. 2d 235 (1948). Later Mrs. Rice obtained an increase in the amount of the weekly award, from $15.00 to $100.00, in the New York Court, by constructive service. She reduced this amount to a lump sum judgment in 1951 and successfully sued upon it in Arkansas. See Rice v. Rice, 222 Ark. 639, 262 S. W. 2d 270 (1953).

The Arkansas Court then went on to say that the method used by New York was very similar to its own procedure,[13] and that in examining *Griffin v. Griffin, supra,* they were sure that service of the notice by mail was good "substituted service."

The Superior Court of New Jersey, Appellate Division, in *Kase v. Kase*[14] has gone so far as to hold that, where a motion is filed to change an order in a divorce suit from "divorce only" to "divorce and alimony," twenty years after the divorce was granted on a petition and prayer for general relief but none for alimony, that the notice need only convey the requisite information and afford a reasonable time for appearance, with due regard to the practicalities and peculiarities of the case. They held that personal service of the notice was not necessary. Although the New Jersey courts in this case have gone further than most courts, by holding that an application for alimony can properly be made in a summary manner at foot of a divorce decree, the case does contain a good general review of the cases discussing jurisdiction and notice.

An interesting English case, demonstrating the continuing jurisdiction which British courts exercise over the status of marriage, is *Thynne v. Thynne.*[15] There a wife applied for and was granted a divorce, upon a petition which stated that the marriage had been solemnized in 1927, when in fact there had been a prior secret marriage in 1926. She then made application to the Court asking that the decree be amended to refer to the 1926 marriage. The Appeals Court, by Hodson, L. J., in reversing the lower court held (on page 482): "What is dissolved is the status, not the ceremony," and went on to hold that, as the court has continuing jurisdiction over the parties, the summons should issue, and the court under its inherent powers should amend errors of fact so that all uncertainty be removed.

One of the earlier decisions in Ohio which discusses this problem is *Whitaker v. Whitaker.*[16] In that case the wife had obtained a decree for "alimony only," and later submitted to the jurisdiction of a divorce court in Oregon, which granted the divorce and custody of the children to the wife but did not grant any alimony. She then came back to Ohio and tried to obtain a lump sum judgment on the Ohio "alimony only" decree, by

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[13] The same is true in most jurisdictions. See Note, 22 U. Chicago L. R. 246 (1954-5).

[14] 18 N. J. S. 12, 86 A. 2d 587 (1952).

[15] 3 W. L. R. 465 (1955).

[16] 52 O. A. 223, 6 O. O. 316, 3 N. E. 2d 667 (1936).

giving notice to the defendant by publication. The Court of Appeals of Cuyahoga County, in holding that service by publication upon her non-resident husband will not give the court jurisdiction to grant a personal judgment against such a defendant, was much more concerned about the fact that she had submitted to the jurisdiction of another court than it was about the type of notice. Judge Terrell wrote a strong dissent as to the refusal of the Court to examine the notice with reference to the alimony due before the divorce in Oregon was granted. He found that there had been personal service in the first instance, and then held that the jurisdiction is a continuing jurisdiction, that there was proper notice, and that the defendant had had ample opportunity to appear and to contest the granting of the motion, that he did appear and object, and that since jurisdiction was continuing the Court should have heard the motion and reduced to judgment the unpaid installments up to the time of the divorce.[17]

The Ohio Supreme Court spoke of the continuing jurisdiction of a divorce court in *Corbett v. Corbett*,[18] wherein they held that there was continuing jurisdiction so long as the decree provides for the custody, care and support of minor children. They then held that the proper way to modify the order was by motion in the original case. The method of serving the notice was not discussed.

The first time the Ohio Supreme Court discussed the type of notice necessary in cases involving continued jurisdiction was in the 1956 case of *Van Divort v. Van Divort*,[19] where it was held, in the following syllabi, that:

> "3. Under the continuing jurisdiction of the court in a divorce action, the filing of an application or motion for a modification of an order or decree for care, custody and support of minor children of the parties is not the institution of a new or original proceeding but of one ancillary and incidental to the original action, and no new service of summons on a party is necessary to give the court jurisdiction to make further orders as to minor-child support, regardless of the place of residence of such party.
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> "4. In the absence of statutory procedure for the notification of a party to a divorce action of the filing of an application

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[17] The propriety of this dissent as regards service by publication under present Ohio law is questionable, as the State statute authorizing service by publication is limited in its aspects and must be strictly construed. Ohio R. C., Sec. 2703.14; Johnson v. Johnson, 31 O. O. 122 (1945).

[18] 123 O. S. 76, 174 N. E. 10 (1930).

[19] 165 O. S. 141, 134 N. E. 2d 715 (1956); discussed in 8 West. Res. L. R. 315 (1956).

> or motion by the other party for a modification of a decree for the care, custody or support of minor children of the parties, the court may, within its sound discretion, make rules for the service of notice of such application or motion, and, where the court adopts a rule providing for the service of writs or process by mail pursuant to, in accordance with, and to the extent permitted by Section 11297-1, General Code (Section 2703.23, Revised Code), providing for the service of writs or process, and service on a party of notice of such an application or motion is made by mail in accordance with such rule, whereby such party receives actual notice of such application or motion, the court has jurisdiction to consider such application or motion and to modify such decree."

It is interesting to note that the syllabi in the Ohio Supreme Court case differ from those in the Appellate Court.[20] The Supreme Court seems to have narrowed the question, and to have answered only that question which was necessary in the case before it, while the Appellate Court answered the broader question of continuing jurisdiction.[21]

In every jurisdiction examined, where a court sends its notice by certified or registered mail and requires that a return receipt be obtained before jurisdiction is exercised, sufficient actual notice is given, and a court need only determine if the time given in the notice is sufficient under all the circumstances of the case to allow the defendant to enter his appearance and challenge

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[20] In Ohio Supreme Court cases the syllabus of the case is the law of the case, as it is prepared by the judge assigned to prepare the opinion; while in other appellate cases the syllabi are not always prepared by the court, and one must look to the text of the case for the law. See 14 O. Jur. 2d 681, Courts, #247 et seq.

[21] The syllabus of the Appellate case is as follows:

"1. Support orders, whether or not they so provide, are the subject of the continuing jurisdiction of the court and may be modified upon proper application whenever the character and circumstances of the case or the parties require.

"2. A trial court in a divorce action retains jurisdiction of the person of the defendant as well as the subject matter of the action.

"3. Sections 2309.67 to 2309.69, inclusive, Revised Code, dealing with notice of a motion and the service thereof, do not control the method of service of a notice of a motion to modify a support order in a divorce case.

"4. The purpose of notice is to establish knowledge; and a defendant, upon receipt of notice, is charged with the knowledge that the court which made the original support money order had continuing jurisdiction of his person and the continuing right to change the original order."

Van Divort v. Van Divort, 100 O. A. 500, 60 O. O. 392, 137 N. E. 2d 684 (1955).

the claims of the plaintiff.[22] The same is true in many jurisdictions where the notice is given by publication.

Thus many of the cases, including those before the United States Supreme Court, seem to hold that the doctrine of continuing jurisdiction in divorce cases is here to stay. However, in order to satisfy due process requirements, so far as support and/or alimony are concerned, notice must be given; but the type of notice which is necessary is not as important as is the requirement that the defendant be given a fair opportunity to challenge the claims of the plaintiff.

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[22] The discussion here has been limited to continuing jurisdiction so far as alimony is concerned, and there seems to be a conflict of authority as to continuing jurisdiction over custody of children. See Cunningham v. Cunningham, 166 O. S. 203 (1957), where the Court distinguished Van Divort v. Van Divort, supra, n. 21, and held the welfare of the child to be the primary concern of the Court; but to the contrary, Lanctot v. Lanctot, 125 Wash. 310, 216 P. 356 (1923), where the Court recognized the principle that the welfare of the child is to be the primary consideration of the court, but held that there was continuing jurisdiction in the Ohio Court, and felt that it should not determine that the findings of the Ohio Court would not be in the best interests of the child. Also on this same question see Hersey v. Hersey, 371 Mass. 545, 171 N. E. 815 (1930); Burns v. Shaply, 16 Ala. App. 297, 77 S. 447 (1918), and note, 4 J. Publ. L. 206 (1955).